No.

In the Supreme Court of the United States

76-1823

OCTOBER TERM, 1976

28 EAST JACKSON ENTERPRISES, INC.,
Petitioner,

vs.

P. J. CULLERTON, Individually and as Cook County Assessor, and BERNARD J. KORZEN, Individually and as Treasurer and Ex-Officio Collector of Cook County,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To THE HONORABLE CHIEF JUSTICE of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a Writ of Certiorari issue to review the order and opinion of the United States Court of Appeals for the Seventh Circuit entered March 24, 1977 and corrected March 28, 1977, denying Petitioner's second petition for rehearing.

OPINIONS BELOW

The order and opinion of the Court of Appeals for the Seventh Circuit entered March 24, 1977 and corrected March 28, 1977 denying Petitioner's second petition for rehearing has not been officially reported. The original opinion on which rehearing was denied is officially reported at 523 F. 2d 439 (7th Cir. 1975). This case involves a related proceeding in the Circuit Court of Cook County, Illinois and an appeal to the Illinois Supreme Court. The former has not been officially reported; the latter is reported at 65 Ill. 2d 420 (1976). These orders and opinions are set out in the Appendix.

JURISDICTION

The Court of Appeals rendered its order and opinion on March 24, 1977, correcting it by order dated March 28, 1977. This petition is filed within 90 days from March 24, 1977. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Whether the decision below denying to Petitioner a right to return to the federal court for a hearing on the merits of its federal constitutional claims is in conflict with the decision of this Court in *England* v. *Louisiana Board of Medical Examiners,* 375 U.S. 411 (1964) when the Court of Appeals had retained jurisdiction while Petitioner sought a 28 U.S.C. § 1341 remedy in the state court, and the Supreme Court of Illinois refused to hear Petitioner's appeal of the state trial court's denial of relief on the merits solely because Petitioner had made a reservation, pursuant to *England,* to return to the federal court should the state court decide against it?

Whether the decision of the Court of Appeals dismissing Petitioner's case under 28 U.S.C. § 1341 is in conflict with the decision of this Court in *Twp. of Hillsborough* v. *Cromwell,* 326 U.S. 620 (1946) when the federal court retained jurisdiction while Petitioner sought a 28 U.S.C. § 1341 remedy in state court and when, after denial by a state chancellor of injunctive relief to Petitioner on the grounds that Illinois law provided no basis for such relief, the Illinois Supreme Court refused to hear Petitioner's appeal on the merits solely because of its *England* reservation and summarily affirmed the chancellor's denial of injunctive relief and dismissal of Petitioner's case.

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

UNITED STATES CONSTITUTION

Amendment XIV

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTES PROVIDE IN PERTINENT PART

Title 28 USC

§ 1341. Taxes by States

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax

under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

• • •

(3) To redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

TITLE 42 USC

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the juridiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(All emphasis added unless otherwise stated)

STATEMENT OF THE CASE

This civil rights case, for the second time before this court, involves a four-year effort by Petitioner, 28 East Jackson Enterprises, Inc., to this point frustrated by irreconcilable decision of the Seventh Circuit Court of Appeals and the Illinois Supreme Court, to obtain a hearing on the merits of its claims of constitutional deprivation in the assessment of its real property for purposes of taxation.

In 1969 Petitioner, an Illinois corporation, acquired a long-term leasehold interest upon real estate in downtown Chicago improved with a seventy year old office building. The lease obligates it to pay the real estate taxes assessed against the property.

In November 1973 Petitioner brought an action in the district court under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343(3) seeking to enjoin the respondent county collector from selling its property for the lien of 1972 real estate taxes.[1] Petitioner also sought declaratory relief and in a tort count prayed for money damages against the individual respondents.

Petitioner's amended complaint[2] in the district court alleged gross discrimination of long standing in the assessment of real estate in Cook County by the defendant Assessor. Specifically it alleged that notwithstanding the Constitution and laws of Illinois[3] required all property to be assessed uniformly at full fair cash value, real property, since not later than 1958 when he took office, had been assessed by the defendant Cullerton under color of state

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[1] Real estate taxes in Illinois are payable in the year following the levy.

[2] Petitioner's prayer for injunctive relief in its original complaint and its motion for a preliminary injunction to restrain the Collector from proceeding to judgment for its 1972 taxes were rendered moot by the entry of judgment by the Circuit Court of Cook County while the motion was pending before the District Court. An amended complaint and motion to enjoin sale of the taxes to satisfy the judgment were filed, against which the respondents' original motion to dismiss under 28 USC § 1341 was allowed to stand.

[3] Article IX § 4(a) of the Illinois Constitution of 1970 as to uniformity; § 501 Chapter 120 Ill. Rev. Stats. (1971) as to percentage of fair cash value.

law so that property generally in Cook County was assessed far below the statutory level of 100% of fair cash value; and, further, so that wide variations, *i.e.* from less than 5% to over 120%, of fair cash value existed between assessments of individual properties. Plaintiff alleged that the longstanding, discriminatory assessment scheme and methods were well known to the defendant officials, their results being officially reported by the Illinois Department of Local Government Affairs in its annual reports on real estate tax assessments. It further alleged that in 1972 the general level of equalized assessment in Cook County was 40% of fair cash value while its property was assessed at 100%, requiring it to pay taxes of $82,000 rather than $30,000 if assessed as property generally was assessed; and that such discrimination deprived it of rights of due process and equal protection secured to it under the Fourteenth Amendment to the U.S. Constitution.

The amended complaint also alleged that plaintiff had no adequate remedy at law, being without and unable to borrow funds to pay its taxes in full, a condition precedent to an action in the State Court for a refund of the illegally assessed moiety. Such procedure is the only remedy at law in Illinois.[4]

The defendant County officials filed a motion to dismiss under 28 USC § 1341.

Plaintiff moved for a preliminary injunction under Rule 65, Federal Rules of Civil Procedure, and after an evidentiary hearing the District Court entered such an in-

[4] Payment of taxes in full under protest and filing of objections to the annual application by the County Collector for judgment, *Cf.* Chapter 120, Illinois Revised Statutes § 675, 716. Taxpayers are not entitled to interest on refunds. *Lakefront Realty Corp.* v. *Lorenz,* 19 Ill. 2d 415, 422-3 (1960).

junction on January 23 1974, restraining the Collector from selling the subject property for taxes. (App. 4a) The Court found, *inter alia,* that the taxpayer was unable to pay its taxes in full, had no plain, speedy and efficient remedy under Illinois law, would suffer irreparable harm if its taxes were sold, and had a reasonable likelihood to prevail ultimately. It further found that the levying of taxes which have a discriminatory effect between taxpayers can violate the equal protection clause of the 14th Amendment to the United States Constitution. (App. 2a)

The defendants offered no evidence and relied on their motion to dismiss and the "integrity of the tax bills".

The defendant officials appealed under 28 USC § 1292 and the Seventh Circuit reversed, Swygert, J., dissenting in part. The majority held that 28 USC § 1341 barred federal jurisdiction since it was "reasonably certain that Illinois courts would entertain a suit for injunction when a taxpayer establishes that he lacks the funds to comply with the statutory remedy of payment under protest." 523 F. 2d 439, 442 (App. 11a). The Court of Appeals ordered the entire action dismissed including the declaratory and damage claims, stating that the "Complaint, fairly read, seeks solely to suspend or restrain the collection of (plaintiff's) 1972 real estate taxes." Id. 440 n. 2 (App. 7a.)

The dissent held that the majority's "reasonable certainty" was based on a mere prediction of what Illinois law would be and did not approach "a certainty within the contemplation of § 1341" and that "§ 1341 does not apply when the existence or adequacy of a state remedy is in doubt or uncertain. *Hillsborough* v. *Cromwell,* 326 U.S. 620, 625-6, 66 S.Ct. 445, 90 LEd. 358 (1946.)" Id. 442, 443. (App. 10a-11a). Petitioner thereupon filed its petition

for writ of certiorari in this court seeking review of the Seventh Circuit's decision. The petition was denied January 19, 1976, 423 U.S. 1973.

Meanwhile Petitioner, as a result of the reversal by the Court of Appeals, filed two state court actions in the Circuit Court of Cook County; the first, 75CH6436 sought injunctive relief from sale of its property for 1972 taxes, those involved in the reversed District Court case, as well as for 1973 taxes for which a district court preliminary injunction had also been entered; the second, 76CH14 sought similar injunction relief for 1974 taxes, the sale for which was imminent. The latter suit was heard first and Petitioner's motion for a preliminary injunction was denied on January 22, 1976 and the case thereafter dismissed. See orders, App. 14a and 15a. The Chancellor found that the quantum of constructive fraud alleged was "not of the extent required to render the application of the law of the *Clarendon* and *Hoyne*[5] cases to this particular piece of property. The allegation of inability to pay taxes does not afford a basis for equitable relief under Illinois law." He concluded: ". . . plaintiff's complaint does not state a cause of action under Illinois law . . . No preliminary injunction may enter as the entry of such an injunction would be contrary to the law of this State." App. 14a.

In both state court actions Petitioner's allegations were substantially the same as in the district court except that no federal constitutional claims were raised. Petitioner

[5] *Clarendon Associates* v. *Korzen,* 56 Ill. 2d 95 (1974), and *Hoyne Savings and Loan Association* v. *Hare,* 60 Ill. 2d 84 (1974), cases cited by the Court of Appeals to support its finding of reasonable certainty that Illinois courts would give relief to a taxpayer in Petitioner's circumstances.

advised the court of its federal claims but reserved the adjudication of these claims to the federal court under the procedure prescribed in *England* v. *Louisiana Board of Medical Examiners,* 375 U.S. 411 (1964).

As a result of denial of a state court remedy, Petitioner filed a petition for rehearing of its petition in this court, advising it of the state court action. The petition was denied on March 8, 1976, 424 U.S. 959. On February 19, 1976, Petitioner sought a stay of the Seventh Circuit's mandate and a stay was granted pending action of this court on the petition for rehearing. After its denial, the Court of Appeals stayed its mandate, Order of April 5, 1976, (App. 15a) pending final adjudication of Petitioners's actions 75CH6436 and 76CH14 in the state court ". . . . because the issues raised in (its) state court cases may test the existence of a plain, speedy and efficient state court remedy. . . ." (App. 16a)

Petitioner prosecuted an appeal to the Illinois Supreme Court of the denial of a preliminary injunction and dismissal of 76CH14. At the start of oral argument of the case in June 1976, counsel stated that he was making the reservation with respect to Petitioner's federal claims as prescribed in *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411. After a lengthy colloquy the court struck the case from the argument calendar and instructed counsel to brief the question of reservation. Counsel did so, informing the court of this court's holdings in *NAACP* v. *Button,* 371 U.S. 415; *Government & Civil Employees Organizing Committee* v. *Windsor,* 353 U.S. 364 and *England.* Counsel advised the court of Petitioner's federal claims of equal protection and due process, stated that Petitioner "cannot prevent the state court from rendering a decision on a federal question if it chooses to

do so", informed the court that he was "exposing his federal claims only for the purpose of complying with *Windsor* and ". . . respectfully ask(ed) that my remarks to the court in the cause of both oral arguments be construed as an effort on my behalf to live within the bounds set by *England.*" Letter of Counsel to Illinois Supreme Court. (App. 23a)

The case was argued in November, 1976 and the Illinois Court, without considering the issues, affirmed the circuit court orders denying equitable relief. It held that under the Illinois Constitution, in an *England* reservation case, Illinois courts may not "pass upon those questions of State law which the plaintiff has raised, including the question whether the complaint alleges a cause of action for injunctive relief". *28 East Jackson Enterprises, Inc.* v. *Rosewell,* 65 Ill. 2d 420, decided December 3, 1976 (App. 22a). No petition to this court was taken therefrom.

Petitioner, pursuant to the order of April 5, 1976, then advised the Court of Appeals of the Illinois decision. The parties were ordered to brief the second petition for rehearing and did so. On March 24, 1977 the Seventh Circuit denied the petition stating:

> "We have considered the . . . decision of the Illinois Supreme Court and do not find that it evidences an unwillingness on the part of the courts of that state to grant equitable relief to a taxpayer in plaintiff's alleged circumstances." (App. 27a)

It further held that the §1341 inquiry must be "whether or not there is an adequate state court remedy for *federal* claims," and that by framing its state court case as it had in reliance on *England,* Petitioner must bear "primary responsibility for the Illinois Court's refusal to address the merits of [Petitioner's] . . . case." Petitioner seeks review of this decision in this court.

REASONS FOR GRANTING THE WRIT

The decision below is in conflict with this Court's decision in *England* v. *Louisiana Board of Medical Examiners,* 375 U.S. 411 (1964). It will produce procedural chaos, alter settled principles of federal-state comity, establish a precedent by which state courts can prevent proper enforcement of federal constitutional rights and deny a litigant a federal forum provided by 28 U.S.C. §1331 and §1343.

The decision below is in conflict with this Court's decision in *Township of Hillsborough* v. *Cromwell,* 326 U.S. 620 (1946). It denies Petitioner's right to a federal forum under 28 U.S.C. §1331 and §1343 for redress of federal constitutional claims when not only is the existence of a plain, speedy and efficient remedy (28 U.S.C. §1341) in state court uncertain but nonexistent. Further, it establishes a precedent whereby a state court, refusing to afford a litigant a state remedy, may preclude the federal court from considering the litigant's federal constitutional claims.

ARGUMENT

I

THE DECISION BELOW CONFLICTS WITH ENGLAND V. LOUISIANA STATE BOARD OF MEDICAL EXAMINERS, 375 US 411 (1964)

In this case Petitioner alleges substantial constitutional deprivations and, because tax matters are involved, was sent to the state court on the authority of 28 U.S.C. Section 1341 which provides:

> "The district court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

Since, as the Court of Appeals below recognized,

> "if the adequacy of a state remedy is uncertain, Section 1341 does not divest the federal court of jurisdiction. *Hillsborough* v. *Cromwell*, 326 U.S. 620, 625-626 . . . (1946)." *28 East Jackson Enterprises, Inc.* v. *Cullerton*, 523 F.2d at 442,

Petitioner was required to determine what procedural route to follow in order not to foreclose its right to return to federal court on its federal claims should those claims remain unvindicated after the state adjudication. Prior to this court's decision in *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), considerable confusion surrounded this matter. 73 Harv. L.R. 1358 (1960); 59 Col. L.R. 749 (1959). As a consequence of *England*, however, the matter became, in Petitioner's judgment, settled.

The central issue here is, therefore, whether Petitioner was correct in relying on *England* v. *Louisiana State*

Board of Medical Examiners, 375 U.S. 411 (1964) when relegated to the state court by the Court of Appeals to test the "plain, speedy and efficient" character of state court relief. If reliance was proper, the Court of Appeals, in refusing to honor it by granting the rehearing has disregarded the settled teachings of this court, shirked its "solemn responsibility . . . to 'guard, enforce and protect every right granted or secured by the Constitution of the United States,'" *Kusper* v. *Pontikes*, 414 U.S. 51, 55 (1973), and deprived Petitioner of a hearing *by any court* on the merits of its Constitutional claims. More importantly, the Court of Appeals' decision will produce procedural chaos in the area of abstention and sanction a course of conduct by the state judiciary that cannot help but spawn substantial disharmony in future federal-state relations.

In considering Petitioner's argument, it is important to note the abstention character of the circumstances presented. As in the typical abstention case and for the same general policy reasons, Petitioner was remitted by the federal court to the state court with the realization that federal jurisdiction might have to be reactivated if relief was not given in the state court: "The principles of comity and restraint embodied in Section 1341 require that plaintiff *first* seek equitable relief in the Illinois courts." 523 F.2d at 442. And although a formal abstention order might more properly have been entered, as Judge Swygert would have preferred, *Id.*, the Court of Appeals throughout the state court proceedings has in fact retained jurisdiction[6] with the admonition traditional in abstention cases:

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[6] By its stay of the mandate on April 5, 1976, App. 17a, the Court of Appeals permitted the preliminary injunction of the District Court to remain in effect" pending adjudication of plaintiff's cases in the State Court."

"At such time as plaintiff's cases have been finally adjudicated in the state court, plaintiff may, if it so chooses, petition this Court for rehearing of the present case." App. 17a

A. THE RULE IN ENGLAND

Plaintiffs in *NAACP* v. *Button,* 371 U.S. 415 (1963), sought a federal court injunction against enforcement of a state law as being unconstitutional as applied. The federal court, retaining jurisdiction, abstained, remitting plaintiffs to the state courts to obtain an authoritative construction of the statute involved. On repair to the state court, however, plaintiffs elected to seek there "'a binding adjudication' of *all* claims" and made "no reservation to the disposition of the *entire* case by the state courts." Under these circumstances this court ruled that the district court's "reservation of jurisdiction is purely formal, and does not impair our jurisdiction to review directly an otherwise final state court judgment." 371 U.S. at 437. Thus under *Button* a plaintiff remitted to state court may elect to adjudicate his federal rights there and if he does, his route for review is by direct appeal, or petition for writ of certiorari to this court as the case may be. If, however, he determines to reserve his federal rights, he may, should a federal question remain after the state adjudication of the state claims in issue, return to federal court to litigate his federal claims.

The rule in *Button* was, however, potentially at odds with this court's earlier decision in *Government and Civil Employees Organizing Committee* v. *Windsor,* 353 U.S. 364 (1957), in which the constitutionality of a state statute was challenged in federal court. Retaining jurisdiction, the district court allowed the plaintiffs to exhaust such "judicial remedies as may be available" in state court.

353 U.S. at 365. The plaintiffs then submitted only their state claims to the state court. When on return to the district court they were denied relief, this court reversed and remanded:

"with directions [to the district court] to retain jurisdiction until efforts to obtain an appropriate adjudication in the state courts have been exhausted." 353 U.S. at 366-367.

This ruling was widely understood as *requiring* a party to litigate his *federal* claims in *state* court in abstention and comity references. *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. at 420.

Windsor and *Button* were reconciled in *England.* There the district court, while retaining jurisdiction, sent plaintiffs to the Louisiana courts to determine whether the challenged state statute applied to them. In the state proceedings plaintiffs unreservedly tendered all issues, including their federal contentions, believing *Windsor* so required. The state courts construed the state statute to apply to plaintiffs and held that as so applied it did not abridge federal constitutional rights. When plaintiffs then returned to the district court their complaint was dismissed, the District Court ruling that the federal questions, having been adjudicated by the state court, could not be relitigated. 194 F.Supp. 521, 522 (E.D. La. 1961).

This court reversed and in doing so drew a procedural line "bright and clear" once and for all to remove "procedural traps operating to deprive [litigants] . . . of their right to a District Court determination of their federal claims." 375 U.S. at 418. *Button* was reaffirmed.

"We now explicitly hold that if a party freely and without reservation submits his federal claims for

> decision by the state courts, litigates them there, and has them decided there, then — whether or not he seeks direct review of the state decision in this Court — he has elected to forego his right to return to the District Court." 375 U.S. at 419.

Windsor was clarified:

> "[That] case does not mean that a party must litigate his federal claims in the state courts, but only that he must inform those courts what his federal claims are, so that the state [issue] . . . may be construed 'in light of' those claims." 375 U.S. at 420.

And finally, the talisman for reserving federal rights for federal adjudication was prescribed:

> "[A] party may readily forestall any conclusion that he has elected not to return to the District Court. He may accomplish this by making on the state record the 'reservation to the disposition of the entire case by the state courts' that we referred to in *Button.* That is, he may inform the state courts that he is exposing his federal claims there only for the purpose of complying with *Windsor, and that he intends, should the state court hold against him on the question of state law,* to return to the District Court for disposition of his federal contentions. . . . When the reservation has been made . . . his right to return will in all events be preserved." 375 U.S. at 421-422.

In fashioning its reservation rule this court recognized that the state courts were free to decide federal issues inherent in claims brought before them and that nothing in the reservation procedure could prevent such state rulings on federal claims:

> "[T]he parties cannot prevent the state court from rendering a decision on the federal question if it chooses to do so." 375 U.S. at 421.

The effect of reservation therefore is not to foreclose state court rulings on federal issues but merely to prevent

such rulings from raising the bar of res judicata when return to the district court is made necessary by the state court decision, 375 U.S. at 429 (Douglas, J. concurring), thereby denying a litigant's right to a federal adjudication of a federal claim.

B. PETITIONER'S RIGHTFUL RELIANCE ON ENGLAND

The Section 1341 issue aside, *England* applies here without question. This is a case of federal constitutional discrimination and federal jurisdiction rests properly on Section 1343 and 1331, which the federal courts have a "virtually unflagging obligation to exercise." *Colorado River Water Conservation District* v. *U.S.,* 424 U.S. 800, 817 (1976). *England* clearly teaches that a litigant who in these circumstances is relegated to the state court for reasons of comity and there "without reservation submits his federal claims for decision by the state courts" is deemed thereby to have "elected to forego his right to return to the District Court." 375 U.S. at 419. Hence only by invoking *England* could Petitioner realize its rights under Sections 1343 and 1331 in the event the state court failed to provide a remedy for its claims.

It makes no difference for purposes of justifying the invocation of *England* in this case that tax matters, and hence Section 1341, are involved for the key concern, *i.e.,* how to preserve the right to a federal adjudication of federal rights in the event the state remedy is not forthcoming, is the same in both cases. In the typical abstention case this means that the state court has failed to construe a state statute so as to avoid or moot the federal constitutional challenge. In a Section 1341 abstention it means that the state court has failed to provide a plain, speedy and efficient remedy for the constitutional deprivation.

In both cases once a formal, unreserved tender of federal rights is made to the state court, and an adverse ruling is there given, the litigant who attempts to relitigate the federal issues in the district court will be met: (1) by defenses of res judicata, *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. at 428-429 (Douglas, J. concurring); Cf. *Cornwell* v. *Ferguson,* 545 F.2d 1022, 1026 (5th Cir. 1977); and (2) by the provisions of the Judiciary Code prohibiting any federal court other than this Court from reviewing federal constitutional determinations by state courts. *Rooker* v. *Fidelity Trust Co.,* 263, 413, 415-416 (1923); *Atlantic Coast Line R.R. Co.* v. *Brotherhood of Locomotive Engineers,* 398 U.S. 281, 286 (1970); *England* v. *Louisiana State Bd. of Medical Examiners,* 194 F.Supp. 521, 522 (E.D. La. 1961). It was precisely to solve this dilemma, confronting Petitioner just as much as the plaintiffs in *England,* that this Court fashioned the rule in *England* and there is nothing in that rule which would suggest that it does not apply to litigants in Petitioner's present situation.

The Court of Appeals suggests, however, that Petitioner's *England* reservation was inappropriate because it "prompted" the Illinois Supreme Court's "refusal even to address" the Section 1341 issue of whether a state court remedy for Petitioner's claims was available. This position misapprehends the operation of Petitioner's *England* reservation. As this Court has said, and Petitioner reiterated at the state bar, *England* does not "prevent a state court from rendering a decision on federal questions," 375 U.S. at 421; it merely entitles a litigant should his federal rights not be honored in the state forum to return to the district court without facing the prospects of res judicata and related defenses. The Illinois Supreme Court's failure to address the merits,

including the federal merits of Petitioner's claims, was therefore clearly not a consequence of anything in Petitioner's reservation.

Nor was the Illinois Supreme Court's refusal to declare whether or not Petitioner's complaint stated a cause of action under state or federal law a consequence of some limitation on its authority under the Illinois Constitution. The state court's reference to prohibitions against "advisory" opinions and decisions which do not "definitively adjudicate . . . rights" and likening its role to that of "a master in chancery" to the district court, *28 East Jackson Enterprises, Inc.* v. *Rosewell,* 65 Ill. 2d at 425-426 are misplaced. Manifestly, the Illinois Supreme Court had authority to issue a variety of orders each of which would have answered the Section 1341 inquiry and avoided the federal-state confrontation now at hand.

The Illinois Supreme Court could have ruled that Illinois law affords injunctive relief against discriminatory assessments to taxpayers who like Petitioner lack funds to pursue the remedy at law. Such a decision would definitively adjudicate Petitioner's rights, be binding on all courts including the district court, and, by giving relief in the state courts, raise the bar of Section 1341, preclude Petitioner's return to the district court and secure to the state the proper management of fiscal affairs as contemplated by Congress. *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U.S. 293, 298-299 (1943). Similar relief with similar consequences could have been given under state constitutional law. The Illinois Supreme Court, however, *chose* not to issue such rulings.

The Illinois Supreme Court could also have given Petitioner redress on federal grounds, thereby again affording it a plain, speedy and efficient remedy sufficient

under Section 1341 to foreclose Petitioner's return to the federal court, "review" of its decision by an inferior federal court, and any prospect of federal interference in matters of state taxation. The Illinois Supreme Court, however, *chose* not to act in this manner either.

The contrived inability of the Illinois Supreme Court to rule on the merits of Petitioner's claim because of the *England* reservation appears even more disingenuous if it is assumed, as apparently the Court of Appeals and the Illinois Supreme Court did, that the Illinois Supreme Court, absent only the *England* reservation, would have had full authority to rule on Petitioner's federal claims. If relitigation in the district court of such federal claims would not constitute an "advisory" opinion or make the state court a "master in chancery" to the district court in cases where *England* has not been invoked, it is untenable to argue that invocation of *England* produces the opposite result.

Indeed, if there were any merit at all to the Illinois Supreme Court's position that Petitioner's reliance on *England* reduces its adjudications on matters of state law to the status of advisory opinions not authorized by the Illinois Constitution, the entire state judiciary would be prohibited from participating in any abstention proceeding which follows this Court's procedural guidelines in *England*. Of course no such prohibition exists.

These circumstances leave no doubt that Petitioner properly invoked *England* and in so doing did not prevent the Illinois Supreme Court from issuing a decision on the merits which would enable the federal court readily to determine its jurisdiction *vel non* under § 1341.

Moreover, even if there were some doubt as to whether Petitioner's reliance was correctly placed upon *England*,

there can be no doubt, for reasons given above, it was reasonable and justifiable.[7] *England* announced a generalized rule, 375 U.S. at 418, with a "bright and clear" procedure departing from and clarifying the *Windsor* rule which was thought to require tender of federal claims by a litigant remitted to state court. If the *Windsor* approach is to be revived, that revival, in fairness, should be given prospective application only. *England* v. *Louisiana State Bd. of Medical Examiners,* 375 U.S. at 422; *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, 107-108 (1971).

Finally, even if the Illinois Supreme Court somehow could be said to have lacked authority to render a decision on the federal issues[8] in Petitioner's case by virtue of the *England* reservation, there is nothing in the decisions of this court or the requirements of §1341 which would prevent the district court from resuming jurisdiction when notified of this lack of authority for, as noted below, notions of comity and the Fox Injunction Act operate to

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[7] The Court of Appeals reinforced Petitioner's belief that the procedure it was following was correct when, *knowing* that the state trial court had denied Petitioner a preliminary injunction solely on grounds of *state* law (App. 14a) (thus expressing no view on Petitioner's federal claims), it nonetheless stayed its mandate pending final disposition of that state court proceeding. Had the Court of Appeals found fatal to a Section 1341 test the state trial court's failure to express an opinion on the federal issues arising in the wake of denying relief under state law, one would have not expected a stay to issue. Relevant also is Judge Swygert's observation:

> "[R]etention of jurisdiction [by the district court] would assure that if *state* law does not contemplate relief . . . the district court could take appropriate action with dispatch. . . ." 523 F. 2d at 443, n.2.

[8] Cf. Spector Motor Serv., Inc. v. Walsh, 61 A2d 89, 92 (1948). Also 59 Col. L.R. 773 n. 159, 160.

allocate, not destroy jurisdiction. When, therefore, a state court discloses that it is unable for whatever reason to grant the relief, the supposed availability of which in state court occasioned the referral thereto, return to the federal court is proper indeed mandated.

C. THE MISCHIEF IN THE COURT OF APPEALS' DISREGARD FOR ENGLAND

Since Petitioner's use of *England's* reservation procedure was proper, indeed the only way Petitioner could avoid waiving its right to return to the federal court (under §§ 1343 and 1331), the Court of Appeals' refusal to take jurisdiction in the face of the Illinois Supreme Court's deliberate refusal to address the merits of Petitioner's complaint directly conflicts with this Court's teaching in *England*. The consequent evils are several:

1. Procedural Traps Reintroduced

The purpose of the decision in *England* was to put an end to the "procedural traps," 375 U.S. at 419, besetting litigants in abstention circumstances. Should this court permit the Court of Appeals' decision to stand, the "bright and clear" rule, *Id.*, so carefully laid down in *England* will lose its precision and clarity and be replaced by the prior procedural confusion and more. The certain formula prescribed by *England* for preserving the right to a district court determination of federal claims will be replaced by procedural roulette. Who hereafter will be able to say with any degree of certainty whether a litigant shunted from federal to state court should or should not reserve his federal claims in order to assure his right to return to the federal court should return be necessary? Again, litigants may, as Petitioner here, stand to lose substantial federal constitutional rights on a procedural throw of the dice.

2. Federal-State Harmony Undermined

The Tax Injunction Act codified the concepts of comity and abstention as applied to the field of state taxation, and was enacted to assure harmonious federal-state relations. When a district court relegates a litigant to the state court, thereby giving due regard for the competence of the state court, it does so with the expectation that the state court will afford the litigant a full and fair adjudication of the rights in issue. In this sense the achievement of federal-state concord depends as much on the state court's willingness to accept jurisdiction as it does on the federal court's readiness to suspend it. The principles of comity or abstention do not therefore vitiate jurisdiction; rather, they merely facilitate its orderly allocation.

The rule in *England* has likewise been drawn not to destroy jurisdiction but judiciously to honor the respective competences of the state and federal systems. *England* depends for its successful operation on acceptance by the state court of the responsibility to adjudicate cases referred to it. It follows therefore in the present case that the Illinois Supreme Court by refusing to adjudicate the claims remitted to it has withheld the very cooperation required to maintain federal-state harmony. It has stood comity on its head and generated an unseemly clash between the federal and state authorities. The Court of Appeals' refusal to act in the face of this state court inaction cannot but encourage state court inaction elsewhere and in this way further aggravate the present assault on comity.

3. Congressionally Mandated Jurisdiction Destroyed

Far more, however, than simply assaulting federal-state harmony, the Court of Appeals' decision will if left standing create a wide reaching precedent for complete abdica-

tion of congressionally mandated federal jurisdiction. For if state court inaction can foreclose federal jurisdiction and thereby prevent vindication of Petitioner's constitutional rights in this case, what is to prevent similar state court inaction regarding any number of other sensitive constitutional guarantees whose proper enforcement has been assured only because federal courts have possessed jurisdiction to act when state court zeal for federal rights has dimmed? Nothing, for example, would remain of the federal Civil Rights Act of 1871 and the constitutional rights that Act secures if the state courts, upon being asked in an abstention situation to construe a question of state law, could destroy the federal court's power to go forward simply by claiming a lack of authority or willingness to make the requested construction. As noted (Point II, infra), the district court is obligated in such circumstances to protect its own jurisdiction and has "no alternative but to vacate its order of abstention." *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. at 422, n. 12. Since the decision below holds exactly to the contrary on this most important point, only reversal by this court will suffice to reaffirm the power and the duty of the federal courts to protect and exercise the jurisdiction Congress has mandated and conferred upon them and at the same time to secure to Petitioner its constitutional rights.

II

THE DECISION BELOW CONFLICTS WITH HILLSBOROUGH v. CROMWELL, 326 U.S. 620 (1946)

While it is true there exists by policy of this court now codified by the Tax Injunction Act a strong policy of federal non-interference in the field of state taxation,

Matthews v. *Rodgers,* 248 U.S. 521, 525 (1932); *Great Lakes Dredge & Dock Co.* v. *Huffman, supra;* 28 U.S.C. Section 1341, it is equally settled that this respect for state competence to secure federal as well as state rights in the field of state taxation will not countenance an abridgment of federal rights at the hands of the state courts. State court observance of federal rights must be firm and resolute and where the willingness of the state court to afford such observance is even "merely uncertain," *Garrett* v. *Bamford,* 538 F.2d 63, 67 (3rd Cir.), *cert. denied,* .... U.S. .... (1976), the state stands guilty of abusing the delicate "principles of comity and restraint embodied in § 1341," *28 East Jackson Enterprises, Inc.* v. *Cullerton,* 523 F. 2d at 442, and the doors of the district court open wide to assure prompt vindication of the federal rights in issue. *Hillsborough* v. *Cromwell, supra, Spector Motor Service, Inc.* v. *O'Connor,* 340 U.S. 602 (1951); see *Husbands* v. *Commonweath of Pennsylvania,* 359 F. Supp. 925 (E.D. Pa. 1073); *Weissinger* v. *Bosewell,* 330 F. Supp. 65 (M.D. Ala. 1971). Since it is not disputed that the Illinois remedy at law (payment of the tax in full under protest followed by a suit for refund, see 120 Ill. Rev. Stat. §§ 675 and 716 1973)) is not available to a taxpayer who like Petitioner lacks the funds to pay the unjust moiety, *28 East Jackson Enterprises, Inc.* v. *Cullerton,* 523 F. 2d at 441, the question is whether it is "certain" that Illinois courts will in a plain, speedy and efficient manner give equitable relief to a taxpayer in Petitioner's circumstances. If it is not certain they will, as the district court, Judge Swygert in the court below, 523 F. 2d at 442-3, and the state trial court (App. 13a-15a) found, Section 1341 poses no bar to the exercise of federal jurisdiction by the federal courts in this cause and the Court of Appeals must be reversed.

Petitioner has previously argued that state court equitable relief is unavailable or at the very least clearly uncertain for several reasons. First, as of 1973 when Petitioner initially sought the aid of the federal court, no reported Illinois case had ever afforded equitable relief to a taxpayer in Petitioner's circumstances and none has since then. Moreover, as of that date settled law in Illinois limited equitable relief to two situations, *i.e.*, where the challenged tax is levied upon property exempt from taxation or where the tax is unauthorized by law, *Goodyear Tire and Rubber Co.* v. *Tierney,* 411 Ill. 421, 428-429 (1952)* and neither exception applied to Petitioner. Finally, it was also settled Illinois law in 1973 and still is today that a taxpayer like Petitioner was not entitled to interest on a refund of taxes paid under protest, *Lakefront Realty Corp.* v. *Lorenz,* 19 Ill.2d 415, 422-23 (1960); and under federal law this deficiency renders the state remedy inadequate. *U.S.* v. *Livingston,* 179 F.Supp. 9, 13, 15 (E.D.S.C. 1959), *aff'd per curiam,* 364 U.S. 281 (1960); *U.S. and Olin Matheson* v. *Illinois Dep't. of Revenue,* 191 F.Supp. 723 (N.D. Ill.) Rev'd on other grounds, 368 U.S. 158 (1961); *Southern California Telephone Co.* v. *Hopkins,* 13 F.2d 814, 820 (9th Cir. 1926), *aff'd sub nom. Hopkins* v. *Southern California Telephone Co.,* 275 U.S. 393, 399-400 (1928); *Nutt* v. *Ellerbe,* 56 F.2d 1058, 1062-1063 (E.D.S.C. 1932); *Mullaney* v. *Hess,* 189 F.2d 417, 420 (9th Cir. 1951); *Procter & Gamble Distributing Company* v. *Sherman,* 2 F.2d 165, 166 (S.D.N.Y. 1924) (Learned Hand, J.); *Southern Railway Co.* v. *Query,* 21 F.2d 33, 342 (E.D.S.C. 1927); *Cf.*

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*"Injunctive relief has *never* been given * * * to correct an erroneous assessment or to question the size or amount of an assessment."

Educational Films Corp. v. *Ward,* 282 U.S. 399, 386, n.2 (1931).

The majority of the Court of Appeals, however, argued that it was "reasonably certain," 523 F.2d at 442, Illinois courts would grant Petitioner injunctive relief. That reasonable certainty rested on *dicta* in *Clarendon Associates* v. *Korzen,* 56 Ill. 2d 101, 127 (1973) suggesting the availability of injunctive relief from fraudulently excessive assessments when, in addition, the remedy at law is not available; an ambiguous inference in *Exchange National Bank* v. *Cullerton,* 17 Ill. App.3d 392, 395 (1st Dist. 1974), that a complaint seeking injunctive relief from a fraudulently excessive tax on the grounds of a denial of due process might not have been dismissed had the taxpayer alleged inability to pay; and the result in *Hoyne Savings & Loan Association* v. *Hare,* 60 Ill. 2d 84 (1974) granting injunctive relief against 1971 taxes alleged to be fraudulently excessive when the 1971 assessment for those taxes had been increased 2500% over the 1970 assessment. In truth, however, these three decisions, at best, do no more than support what Judge Swygert called a "mere prediction," 523 F.2d at 442, and not a very good prediction at that. The taxpayer in *Hoyne,* for example was denied injunctive relief for his 1972 taxes although they were almost identical in amount to the excessive 1971 taxes and were based on the same admitted fraudulent 1971 assessment, a result which has led the Illinois appellate courts uniformly to attribute the result in the first *Hoyne* case to procedural deficiencies (which do *not* attend Petitioner's situation) and not the magnitude of the tax excess which, in any event, Petitioner could not match here. *Mid-Continental Realty Corp.* v. *Korzen,* 40 Ill.App. 3d 133, 142-143 (1st Dist. 1976); *In re Application of County Treasurer,* 35 Ill. App. 3d 449, 452 (1st Dist. 1976).

Certainly the fact that Petitioner, the district court and one of the three judges of the Court of Appeals were unanimous in their belief that the availability of injunctive relief in the Illinois Courts was at best uncertain must raise serious doubt as to whether a state remedy can ever be said to be "certain" within the contemplation of Section 1341 under such circumstances.

In any event, two occurrences since Petitioner's referral to the state court have unquestionably removed whatever "certainty" the Court of Appeals may, rightly or wrongly, have thought there was in the existence of state court relief for Petitioner. First, the state trial court denied Petitioner's request for preliminary injunctive relief on the express grounds that Petitioner's allegations did "not state a cause of action under Illinois law," under *Clarendon and Hoyne* (App. 13a), contrary to the expectations of the majority below, and dismissed Petitioner's complaint with prejudice. Secondly, the Illinois Supreme Court affirmed the trial court's dismissal, 65 Ill. 2d at 426, with the result that Petitioner now has *no means whatsoever of obtaining a hearing of any kind in the courts of Illinois* on the merits of its complaint of unconstitutional tax discrimination. It is no longer even "merely uncertain," *Garrett* v. *Bamford, supra,* that Illinois courts will not afford Petitioner relief; *it is certain they will not!*

The result is not changed by the Illinois Supreme Court's supposed "refusal even to address" the merits of Petitioner's claims for that refusal, prompted solely by Petitioner's adherence to the teachings of this court in *England* and for that reason improper (See Point I, *supra*), gives no warrant for abdicating federal jurisdiction by virtue of Section 1341. When faced with a similar question in *England,* this court firmly expressed its views

on the duty of the district court to resume jurisdiction when the state court, to which a federal litigant has been remitted, refuses to make the adjudications required of it:

> "It has been suggested that state courts may 'take no more pleasure than do federal courts in deciding cases piecemeal. . .' and 'probably prefer to determine their questions of law with complete records of cases in which they can enter final judgments before them.' . . . . *We are confident that state courts,* sharing the abstention doctrine's purpose of 'furthering the harmonious relation between state and federal authority' . . . . *will respect a litigant's reservation of his federal claims for decision by the federal courts. . . . .*"
>
> "However, evidence that a party has been compelled by the state courts to litigate his federal claims there will of course preclude a finding that he has voluntarily done so. *And if the state court has declined to decide the state question because of the litigant's refusal to submit without reservation the federal question as well, the District Court will have no alternative but to vacate its order of abstention.*" 375 U.S. at 421, n.12.

Since it is manifest that the Illinois courts do not afford a plain, speedy and efficient remedy for tax fraud which abridges federal rights of equal protection and due process under the circumstances presented, it is equally clear that Section 1341 as construed by this court in *Cromwell* poses no bar to federal jurisdiction and that the Court of Appeals in ruling to the contrary has improperly rejected *Cromwell,* thereby denying Petitioner a hearing on the merits of its claims in *any* forum, and should therefore be reversed.

CONCLUSION

For the reasons stated, Petitioner respectfully prays that a Writ of Certiorari issue to the Court of Appeals of the Seventh Circuit to review its decision denying Petitioner's petition for rehearing; that the decision be reversed and it be ordered to remand the case to the district court for a hearing on the permanent injunction.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
Northern District Of Illinois
Eastern Division

28 EAST JACKSON ENTERPRISES, INC., *Plaintiff*,

v.

P. J. CULLERTON, Individually and as Cook County Assessor, and BERNARD J. KORZEN, Individually and as Treasurer and ex-officio County Collector of Cook County, *Defendants*.

No. 73 C 2876

PRELIMINARY INJUNCTION

This cause came on to be heard on plaintiff's motion for a preliminary injunction to enjoin the defendant Korzen from selling plaintiff's real estate for 1972 taxes. The court heard evidence submitted by the plaintiff, and the defendants offered none. They rely on their motion to dismiss for lack of jurisdiction and upon the "integrity of the tax bills." Other legal defenses are raised in their written argument and have been considered. We find and conclude that plaintiff is entitled to a preliminary injunction until further order of this court.

On the issue of Federal jurisdiction, the court has already ruled in favor of the plaintiff in an earlier case between these same parties (No. 72 C 1373). The levying of taxes which have a discriminatory effect between taxpayers can violate the equal protection clause of the 14th Amendment to the Constitution of the United States. See *Sunday Lake Iron Co.* v. *Wakefield*, 247 U.S. 350 at 352 (1918). This affords the court jurisdiction under 28 U.S.C. §1343 and 42 U.S.C. §1983.

The plaintiff does not have a speedy and efficient remedy under the laws of the State of Illinois. Hence 28 U.S.C. §1341 is no impediment to an injunction. We will not repeat the reasons for this as stated in our decision in 72 C 1373 entered January 23, 1973. Thus the only new question raised by plaintiff's motion is whether it has shown by the evidence that it is entitled to preliminary equitable relief by way of an injunction.

We find and conclude that plaintiff very likely will be irreparably damaged if a preliminary injunction is not entered before its leasehold is sold for taxes on January 24, 1974. Plaintiff has testified without contradiction that it has no funds with which to pay its 1972 tax. It is likewise undisputed in the evidence that plaintiff cannot borrow this amount, presumably because its sole asset is a lease which is subject to termination upon a tax sale. Termination of the lease would leave plaintiff with no assets or remedy except by means of the instant lawsuit, and it would probably be deprived of the financial ability to carry forward the lawsuit.

We also find and conclude that plaintiff has a reasonable likelihood to prevail ultimately. The evidence shown that its property was taxed at 68% of cash value in 1972 when real estate generally in Cook County was being taxed at 27% of full value. This violated Sec. 501 of Chapter 12 of the Illinois Revised Statutes and apparently violates Art. IX, Sec. 4(a) of the Illinois Constitution of 1970. The defendants have not put these facts at issue by evidence or by filing an answer to the complaint or to the motion for a preliminary injunction, preferring to rest solely upon issues of law. They assert in their Argument that the Cook County Assessor has been following a system of classification and that plaintiff has not shown that its property is taxed discriminatorily within its own class. However, the evidence does not show any system of classification either in 1972 or before, but it does show a variation from approximately 20% to 42% in the assessment of different kinds

of real estate in Cook County compared to their fair market value.

Just what defendant believes to be plaintiff's speedy and efficient remedy in the State Court escapes us. Plaintiff no longer has the legal right to pay its taxes under protest, and its evidence is undisputed that it lacked the financial ability to do so at any time after the 1972 taxes were assessed. Furthermore this has been termed a "cumbersome and ponderous process" by the Illinois Supreme Court in *People ex rel. Kohorst* v. *G.M. & O.R.R. Co.*, 22 Ill. 2d 104, 109 (1961). Even if it could have paid under protest, we have previously held that the disparity between the current interest rate and the defendants' refusal to pay any interest on taxes paid under protest deprives plaintiff of the kind of remedy contemplated by Sec. 1341. See our opinion in No. 72 C 1373 referred to above.

The question of comity between the Federal and County jurisdiction is not as dramatically presented in the case at bar as it was in the class action previously upheld by this court in *Biasco, etc.* v. *Cullerton, et al.*, 72 C 1224. The amount of taxes assessed against plaintiff is a miniscule proportion of the County's tax revenue (allegedly .008%), and the entry of a preliminary injunction will have no discernible effect on the performance of its governmental functions. See also the numerous instances where Federal courts do intervene in state proceedings recently reviewed by Justice Douglas, dissenting on another point, in *O'Shea* v. *Littleton*, ... U.S. ....., 42 U.S.L.W. 4139 at 4146 (1974). We believe that the slight deprivation suffered by the taxing body by the issuance of a preliminary injunction is outweighed by the desirability of arriving at a final decision in this significant test case.

We have considered the possibility of requiring plaintiff to post a bond for the amount of its taxes pending the outcome of this case. This has not been requested by the defendants, and we will not require one on our own

motion, because it appears from the evidence that plaintiff has ample assets to guarantee the payment of its 1972 taxes with interest if this is the final outcome of this lawsuit. On the other hand, we are not going to enter an injunction pending the final outcome of this case because the defendants may wish to offer evidence on factual issues which have so far been uncontested. We see no reason why this case and No. 72 C 1373 cannot be tried on their merits within the next few months.

It Is Therefore Ordered, Adjudged And Decreed that defendant Bernard J. Korzen, Individually and as Treasurer and ex-officio County Collector of Cook County is enjoined from selling plaintiff's property designated as index nos. 1715 104 020 and 021 for the 1972 real estate taxes until further order of this court.

Enter:
/s/ Thomas R. McMillen
Thomas R. McMillen
Judge, U. S. District Court

Dated: January 23, 1974

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28 East Jackson Enterprises, Inc.,
Plaintiff-Appellee,
v.
P. J. Cullerton, Individually and as Cook County Assessor, and Bernard J. Korzen, Individually and as Treasurer and Ex-Officio Collector of Cook County,
Defendants-Appellants.

No. 74-1179

United States Court of Appeals,
Seventh Circuit.

Argued Sept. 13, 1974.
Decided Aug. 8, 1975.

As Amended on Denial of
Rehearing Oct. 99, 1975.
Certiorari Denied Jan. 19, 1976.
See 96 S.Ct. 856.

Before Fairchild, Chief Judge, and Swygert and Sprecher, Circuit Judges.

Fairchild, Chief Judge.

Plaintiff, 28 East Jackson Enterprises, Inc., owns a long-term leasehold interest in an office building in downtown Chicago and is obligated to pay the real estate taxes on the property. Defendant Korzen, Treasurer and ex-officio Collector of Cook County, levied $82,925.52 in real estate taxes against plaintiff's property. Plaintiff, allegedly lacking the funds and ability to borrow funds to pay the taxes, brought this civil rights action under 42 U.S.C. § 1983 to enjoin Korzen from making an application for judgment and order of sale of the property for nonpayment of the 1972 levy. Federal jurisdiction was alleged to rest on 28 U.S.C. § 1343(3) and 28 U.S.C. § 1331.

[1, 2] The gist of the claim is that plaintiff's 1972 real estate assessment was fraudulently excessive in that plaintiff's property was assessed at 70 percent of fair cash value while property in Cook County was generally assessed at 25 percent and that such a disparity violated the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution, Art. IX, § 4(a) of the Illinois Constitution, and § 501 of ch. 120, Ill.Stat.Ann. (Smith-Hurd Supp.1975-76).[1] At no time have these issues been presented to an Illinois court.

Plaintiff sought a preliminary injunction, and the defendants filed a motion to dismiss for lack of jurisdiction and failure to state a claim. Before the district court ruled on the motions, the Circuit Court of Cook County, on the defendant Korzen's application, entered judgment and order of sale agaist plaintiff's property. Plaintiff amended its complaint to enjoin the state court ordered tax sale. After a hearing, at which defendants did not rebut plaintiff's claim but chose to rely on their jurisdictional defenses, the district court granted plaintiff preliminary injunctive relief. Defendants brought this interlocutory appeal pursuant to 28 U.S.C.A. § 1292(a)(1). We reverse.

[3] Plaintiff's complaint, fairly read, seeks solely to suspend or restrain the collection of its 1972 real estate

[1] At Illinois law plaintiff's claim is recognized as a claim sounding in constructive fraud. If a taxpayer can prove that his property is assessed at a value disproportionately higher than similarly situated property, the assessment is deemed fraudulent See, *e. g., People ex rel. Skidmore* v. *Anderson,* 56 Ill.2d 334, 307 N.E.2d 391 (1974). If the taxpayer prevails, his taxes are reduced "to the amount they would have been had other locally assessed property been assessed at the same percentage of value as that of the objector." *People ex rel. County Collector* v. *Amer. Refrig. Co.,* 33 Ill.2d 501, 505, 211 N.E.2d 694, 697 (1965).

taxes.[2] As such it must withstand a jurisdictional challenge under 28 U.S.C. § 1341 if the action is to be maintained. See *e. g., Miller* v. *Bauer, et al.,* 517 F.2d 27 (5th Cir., 1975). That statute provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

[4] Section 1341 codifies the well-established federal policy of noninterference in matters of state taxation. *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U.S. 293, 298-99, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943). "The scrupulous regard for the rightful independence of state government which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it." *Matthews* v. *Rogers,* 284 U.S. 521, 525, 52 S.Ct. 217, 219, 76 L.Ed. 447 (1932).

[2] In addition to injunctive relief, plaintiff requests damages and a declaratory judgment that all of its taxes in excess of $30,400 are unconstitutional and void. Although there is an argument that 28 U.S.C. § 1341 does not bar a federal court from issuing declaratory relief, 1A, pt. 2, J. Moore, Moore's Federal Practice ¶ 0.207 at 2285 (4th ed. 1974), and the Supreme Court has declined expressly to decide the question, *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U.S. 293, 299, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943), we see no reason to treat declaratory and injunctive relief differently in this context. See *Perez* v. *Ledesme,* 401 U.S. 82, 127-28, n. 17, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971) (opinion of Brennan, J.). Nor do we think the damage allegations alter the true nature of this lawsuit. The amended complaint contains only the general type of averments of wilfulness, recklessness, and malice found insufficient to show a purposeful discrimination between persons or classes of persons. *Snowden* v. *Hughes,* 321 U.S. 1, 9—1964S.Ct. 397, 88 L.Ed. 497 (1944).

[5, 6] Defendants contend that Illinois provides plaintiff "plain, speedy and efficient" remedies to challenge the lawfulness of its tax bill. The standard Illinois remedy for objecting to a real estate tax bill is payment under protest and claim for refund pursuant to Ill.Ann. Stat., ch. 120, § 675 (Smith-Hurd Supp. 1975-76).[3] But this remedy requires that the taxes be paid in full before the taxpayer's claim will be considered. *Id.* at § 716. In view of the district court's express finding that plaintiff did not have and could not borrow sufficient funds to pay the full tax, this remedy is not available in this case.[4]

[7] Alternatively, defendants contend that plaintiff can pursue equitable relief in the Illinois courts. A remedy by injunction is a plain, speedy and efficient remedy within the meaning of 28 U.S.C. § 1341. *Kiker* v. *Hefner,* 409 F.2d 1067, 1070 (5th Cir. 1969). In response, plaintiff asserts that such relief is unavailable, or uncertain, in the Illinois courts.

[8] Plaintiff relies heavily on language in *Clarendon Associates* v. *Korzen,* 56 Ill.2d 101, 107, 306 N.E.2d 299

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[3] Taxpayers living in Cook County may also challenge real estate assessments in administrative proceedings by filing an application for reason with the County Assessor. Ill.Ann. Stat., ch. 120, § 579 (Smith-Hurd Supp. 1975-76) or presenting a complaint before the county Board of Appeals. *Id.* §§ 593-606. Plaintiff's complaint alleges that relief before the Cook County Board of Appeals was sought, but that the Board ordered no change in the assessment.

[4] Taxpayers are not entitled to interest on a refund of taxes paid under protest under Ill.Ann. Stat., ch. 120, §§ 675, 716 (Smith-Hurd Supp. 1975-76). *Lakefront Realty Corp.* v. *Lorenz,* 19 Ill.2d 415, 422-23, 167 N.E.2d 236, 240-41 (1960). Plaintiff has argued that this renders the statutory remedy inadequate. See *United States* v. *Department of Revenue of State of Ill.,* 191 F.Supp. 723, 726-27 (N.D.Ill. 1961), *vacated on other grounds,* 368 U.S. 30, 82 S.Ct. 146, 7 L.Ed.2d 90. Since this remedy is not otherwise viable in this case, we express no opinion on this point.

(1973), that Illinois courts will no longer consider a constructively fraudulent assessment as an independent ground for equitable relief. As we read the opinion, however, the court decided that whenever the statutory remedy was an adequate remedy, a taxpayer did not have the choice of injunctive relief. The Illinois Court quite clearly states that, "There will be cases of fraudulently excessive assessments *where the remedy at law will not be adequate and injunctive relief should then be available.*" 56 Ill.2d at 108, 306 N.E.2d at 303 (emphasis supplied). Accord, *LaSalle Nat'l Bk.* v. *County of Cook,* 57 Ill.2d 318, 312 N.E.2d 252 (1974); *Hoyne Savings & Loan Association* v. *Hare,* 60 Ill.2d 84, 322 N.E.2d 833, 836 (1974). Since the legal remedy considered adequate in *Clarendon* was the statutory remedy of payment under protest, it follows that when that remedy is unavailable, as in the present case, an action for an injunction will lie.

This reasoning is fortified by the policy analysis in the *Clarendon* opinion. In Illinois there is no requirement that taxes be paid in full before an injunctive suit may be instituted. Therefore, the Illinois court reasoned, if taxpayers could choose between injunctive relief and the statutory remedy of payment under protest, they would pursue the injunctive remedy to delay payment of the taxes. To permit such a choice would impair the collection of state revenues and undermine the purpose of the statutory remedy. 56 Ill.2d at 108, 306 N.E.2d at 303. In the instant case these considerations are not operative. Here, the taxpayer is not seeking equity to delay payment of the taxes; he is seeking equity because he has no other recourse.

Our view of the Illinois law is further supported by the recent opinion in *Exchange National Bank of Cullerton,* 17 Ill.App.3d 392, 308 N.E.2d 284 (1974). There, a taxpayer appealed the dismissal of an action seeking to enjoin the collection of an allegedly excessive assessment, asserting, though he had failed to allege it in his complaint, that equitable relief was appropriate because he lacked the funds to pay the taxes under protest. In affirm-

ing the dismissal, the appellate court suggested that the complaint would not have been dismissed had it alleged the taxpayer's inability to pay the taxes. 17 Ill.App.2d at 395, 308 N.E.2d at 286-87.

Finally, the Illinois Supreme Court has been willing to grant equitable relief even in instances in which the statutory remedy was available and the tax was neither unauthorized nor levied against exempt property. In *Hoyne Savings & Loan Association* v. *Hare*, 60 Ill.2d 84, 322 N.E.2d 833 (1974), the taxpayer sought and was granted equitable relief for fraudulent assessment where particular circumstances persuaded the Court that it would be unfair and unjust to require that relief be sought through the statutory remedy.

[9, 10] We recognize that if the adequacy of a state remedy is uncertain, section 1341 does not divest the federal courts of jurisdiction. *Hillsborough* v. *Cromwell*, 326 U.S. 620, 625-26, 66 S.Ct. 445, 90 L.Ed. 358 (1946). But we believe that it is reasonably certain that Illinois courts would entertain a suit for injunction when a taxpayer establishes that he lacks the funds to comply with the statutory remedy of payment under protest. Under such circumstances, the principles of comity and restraint embodied in section 1341 require that plaintiff first seek equitable relief in the Illinois courts.

Accordingly, the order appealed from is reversed and the cause is remanded with directions to dismiss the complaint for lack of jurisdiction.

Reversed.

SWYGERT, Circuit Judge (dissenting in part).

While I agree that principles of comity and restraint weigh heavily in favor of this court staying its hand in this case, I cannot agree that it *must* do so for lack of jurisdiction. Section 1341 does not apply when the existence or adequacy of a state remedy is in doubt or uncertain. *Hillsborough* v. *Cromwell*, 326 U.S. 620, 625-26, 66

S.Ct. 445, 90 L.Ed. 358 (1946). While it appears "reasonably certain" to the majority that Illinois courts will entertain a suit for injunctive relief by the appellee, this is in reality a mere prediction that certain language in very recent[1] supreme and appellate court decisions in that state will be read broadly so as to bring appellee's claim within an exception to the general rule that taxpayers in Illinois must pay an assessed tax under protest in order to challenge the validity of the assessment. In order to reach such a result an Illinois court would have to find that 1) the assessment here is "fraudulently excessive," and 2) the Illinois remedy of payment under protest is not adequate where one cannot afford to make such payment. I do not think either finding approaches a certainty within the contemplation of section 1341.

It therefore seems to me that the district court has jurisdiction to enjoin the sale of appellee's property. But this does not necessarily mean that such an injunction is proper or justified. Independent of section 1341, principles of comity and the greater public interest must be carefully considered in deciding whether in a given case a federal court of equity should interfere in a matter involving the collection of taxes under state law. *Cf. Great Lakes Co.* v. *Huffman*, 319 U.S. 293, 297-301, 63 S.Ct. 1070, 87 L.Ed. 1407 (1943). In this particular case it may well turn out that Illinois courts will provide an adequate remedy for appellee by entertaining its suit for injunctive relief. At least it would seem incumbent on it to seek state relief prior to resorting to the federal forum. I would therefore remand this case to the district court with instruction that it vacate its injunction and abstain

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[1] Significantly, the decisions in *Exchange National Bank* v. *Cullerton*, 17 Ill.App.3d 392, [illegible] N.E.2d 284 (1974), and *Hoyne Savings & Loan Assoc.* v. *Hare*, 60 Ill.2d 84, 322 N.E.2d 833 (1974), were rendered after the district court entered its injunction. See *Spector Motor Service* v. *O'Connor*, 340 U.S. 602, 605, 71 S.Ct. 508, 95 L.Ed. 573 (1951); *Dawson* v. *Kentucky Distillers, Inc.*, 255 U.S. 288, 295-96, 41 S.Ct. 272, 65 L.Ed. 638 (1921).

from any further action in the matter pending submission of appellee's claims to an Illinois forum. I would further direct the district court to retain jurisdiction in this case until appellee has either obtained his remedy in that forum or shown an effective denial of such a remedy.[2]

---

[2] Since judgment has already been entered against the property, retention of jurisdiction would assure that if state law does not contemplate equitable relief under these circumstances, the district court could take appropriate action with dispatch so as to avoid a preemptive sale of the property. I would also note my view in this regard that the majority opinion does not preclude a later resort to the federal courts in this case should it become clear that, contrary to the prediction of the majority of our panel, Illinois courts decline to entertain a suit for injunctive relief by the appellee.

State of Illinois)
) ss:
County of Cook)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department—Chancery Division

28 EAST JACKSON ENTERPRISES, INC.,
Plaintiff,
v.
EDWARD J. ROSEWELL, County Treasurer and ex-officio County Collector of Cook County, Illinois,
Defendant.
No. 76 CH 14

ORDER DENYING PRELIMINARY INJUNCTION

This cause coming on upon plaintiff's Motion for a Preliminary Injunction and the Court having jurisdiction of the parties and subject matter, the defendant having notice thereof and being represented by counsel; and

The Court having considered the Motion, the allegations of the verified Complaint and the arguments of counsel and having been informed in the premises, finds:

FINDINGS

1. It has jurisdiction of the parties and of the subject matter.

2. The overvaluation alleged in the Complaint is not of the extent required to render the application of the *Clarendon* and *Hoyne*[1] cases to this particular piece of property.

3. The allegations of inability to pay taxes do not afford a basis for equitable relief under Illinois law.

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[1] *Clarendon Associates* v. *Korzen,* 56 Ill.2d 95 (1974)
Hoyne Savings & Loan Association v. *Hare,* 60 Ill.2d 84 (1974)

CONCLUSIONS

1. This Court concludes that as a matter of law plaintiff's Complaint does not state a cause of action under Illinois law and, upon a motion to dismiss filed against it, the Complaint would be dismissed.
2. No preliminary injunction may enter as the entry of such an injunction would be contrary to the law of this State.

ORDER

It Is Therefore Ordered that plaintiff's Motion for a preliminary injunction be denied.
Dated: Jan. 22, 1976

Enter:
/s/ Walter P. Dahl
Judge

Moses, Gibbons, Abramson & Fox
33 North Dearborn Street
Chicago, Illinois 60602
FInancial 6-8370

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
County Department—Chancery Division

28 EAST JACKSON ENTERPRISES, INC., a corporation,
Plaintiff,
v.
EDWARD J. ROSEWELL, etc.,
Defendant.
No. 76 CH 14

ORDER

This cause coming on to be heard on defendant's motion to dismiss plaintiff's complaint, due notice served, the Court being fully advised in the premises, the Court having heard counsel;

It Is Hereby Ordered that:

1. Plaintiff's complaint is stricken;

2. Plaintiff's counsel, representing to the Court that it [plaintiff] desires to stand on its complaint.

It Is Hereby Further Ordered that:

3. Defendant's Motion to Dismiss is allowed, and plaintiff's complaint is dismissed with prejudice;

4. The Court finds no just cause to delay enforcement or appeal from this order.

March 24, 1976

Enter:
/s/ Walter P. Dahl
Judge

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 5, 1976

Before
Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

28 EAST JACKSON ENTERPRISES, INC.,
Plaintiff-Appellee,
vs.
P. J. CULLERTON, etc., et al.,
Defendants-Appellants.

No. 74-1179

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 73-2876-C

On February 19, 1976 plaintiff-appellee filed a MOTION TO STAY OR, IN THE ALTERNATIVE, RECALL

MANDATE AND TO PERMIT PLAINTIFF-APPELLEE TO FILE A SECOND PETITION FOR REHEARING. The reason for plaintiff's motion was that contrary to this court's holding that plaintiff had a plain, speedy, and efficient remedy available in the state court to pursue injunctive relief, the Circuit Court of Cook County denied plaintiff's motion for a preliminary injunction on the ground that allegations of inability to pay taxes do not afford a basis for relief under Illinois law. Insofaras the mandate in this action had not been issued, this court issued an order on February 24, 1976 staying the mandate pending further order of this court and requesting defendants-appellants to file a response to plaintiff's motion. In their response filed the same date as the court's order, defendants informed the court that pending before the United States Supreme Court was plaintiff's Petition for Rehearing of its Petition for Writ of Certiorari. In light of this fact, defendants claimed that this court lacked jurisdiction to consider plaintiff's motion to stay the mandate.

On March 2, 1976 an order was entered requiring the parties herein to notify this court of the disposition of plaintiff's Petition for Rehearing pending before the Supreme Court. Since plaintiff notified this court by letter dated March 19, 1976 that the Supreme Court had denied its Petition for Rehearing on March 8, 1976, we now consider the request by plaintiff to stay the mandate in the above action.

On consideration of plaintiff's motion, defendants' response, and plaintiff's reply to said response,

It Is Ordered that because the issues raised in plaintiff's state court cases may test the existence of a plain, speedy and efficient state court remedy, the mandate of this court is STAYED pending adjudication of plaintiff's cases in the state court which is final or becomes final by failure to pursue state court remedies, (Circuit Court of Cook County Case Nos. 75 CH 6436 and 76 CH 14 and any appeals therefrom). The parties in this action are

hereby directed to inform this court of any final action taken by the state court with respect to plaintiff's cases. At such time as plaintiff's cases have been finally adjudicated in the state court, plaintiff may, if it so chooses, petition this court for rehearing of the present case. The mandate in this action shall not issue until further order of this court.

(No. 48505.—Judgment affirmed.)

28 EAST JACKSON ENTERPRISES, INC., Appellant, v. EDWARD J. ROSEWELL, County Treasurer, Appellee.

Opinion filed December 3, 1976.

COURTS—*Illinois courts have no authority to render advisory opinions on the existence of rights that are then to be tested in Federal court actions to determine their validity under the U.S. Constitution—taxes.* Illinois courts have no authority to render an opinion as to whether an Illinois taxpayer is entitled to enjoin the collection of so much of the tax on his property as allegedly results from overassessment, when such an opinion would be advisory in nature because of the pendency of Federal court actions to decide the adequacy, under the United States Constitution, of State remedies for such alleged overassessment, for under these circumstances any judgment that an Illinois court might render would not definitely adjudicate the rights of anyone. (Pp. 420-26.)

Appeal from the Circuit Court of Cook County; the Hon. Walter P. Dahl, Judge, presiding.

MR. JUSTICE SCHAEFER delivered the opinion of the court:

The plaintiff, 28 East Jackson Enterprises, Inc., is an Illinois corporation which acquired, in 1969, a long-term lease upon real estate located on Jackson Boulevard in the Loop in downtown Chicago. By a succession of actions filed in the United States District Court for the Northern

District of Illinois, it has succeeded in evading entirely the payment of any real estate taxes upon the entire parcel of property, fee and leasehold, at least since 1972. The present action involves certain limited legal issues with respect to the statutory procedure governing the collection of those taxes and the scope of equitable relief under Illinois law which the plaintiff has selected for presentation to this court. Both in the complaint which the plaintiff filed in the circuit court of Cook County, and in the briefs and oral argument submitted in its behalf in this court, the plaintiff has sought to exclude the Illinois courts from effective consideration of any questions under the Constitution of the United States concerning the adequacy of the administrative and judicial procedures of the State of Illinois for the determination of the validity of the assessment of property for taxing purposes.

A summary of the allegations of the complaint and its description of the theory upon which the plaintiff bases its right to an injunction will be helpful, as will a brief description of the proceedings that have taken place in the Federal courts. The fundamental question before this court, however, concerns the authority of Illinois courts to enter judgments which concededly lack finality because the issues that may be determinative have been deliberately excluded from judicial consideration.

The present complaint was filed in the circuit of Cook County on January 5, 1976, against the defendant, Edward J. Rosewell, county treasurer and *ex officio* county collector of Cook County. It sought an injunction restraining the defendant from selling its property for nonpayment of its 1974 taxes. The circuit court refused to issue a preliminary injunction and subsequently granted the defendant's motion to dismiss the complaint. The plaintiff filed a notice of appeal to the appellate court, and the appeal was transferred here under Rule 302(b).

The complaint alleged that the plaintiff's property had been grossly overassessed because of the failure of the assessor to view the property or to resort to readily

available data which would have shown that its value was substantially less than that at which it was assessed. It also alleged that the defendant collector knew of the improper assessment practices followed by the assessor, and that in issuing tax bills to the plaintiff based upon those assessments the defendant had aided and abetted the assessor in imposing excessive and discriminatory taxes upon the plaintiff. The action taken by the defendant was attacked as being a violation of article IX, section 4, and the due process and equal protection clauses contained in article I, section 2, of the Constitution of Illinois.

The amount of real estate tax for which the plaintiff was billed in 1974 came to about $80,000, according to the complaint. The complaint also alleged that had the plaintiff's property and all other property in Cook County been properly assessed, the 1974 real estate tax charge against the plaintiff's property would have been decreased by about $50,000.

The plaintiff states that it lacked funds and was unable to borrow them in sufficient amount to pay the $80,000 in taxes for which it was billed, and that if the property in question were sold, the plaintiff's ground lease would be subject to forfeiture. Since the statutory procedure for protesting property taxes requires payment of the tax in full under protest as a condition to obtaining judicial review of the assessment (Ill. Rev. Stat. 1975, ch. 120, pars. 675, 716), the plaintiff contended that it had no adequate remedy at law and was therefore entitled to injunctive relief.

In its complaint the plaintiff represented that it was "prepared and willing to pay just taxes on its property" or to pay whatever amount the circuit court "determines to be just." No tender was made at the time of filing suit of that portion of the tax which the plaintiff concedes to be properly due, however. Neither in the complaint filed in the case before us, nor in any of the actions which are filed in the United States district court, did the plaintiff

tender into court any amount whatsoever. Its position in this respect is described in these terms in its brief in this court:

> "• • • Taxpayer does not argue that equity has the power to enjoin collection of, or judgment and order of sale with respect to the just and legal part of the tax. Rather, it is the unjust or illegal moiety which taxpayer insists may be enjoined when taxpayer lacks funds to follow the statutory remedy, and this illegal part may be enjoined without regard to whether all, some or none of the just moiety has been paid. • • •"

(In an earlier proceeding the United States district court issued its injunction restraining the collection of the tax without bond, saying:

> "• • • This has not been requested by the defendants, and we will not require one on our own motion, because it appears from the evidence that plaintiff has ample assets to guarantee the payment of its 1972 taxes with interest if this is the final outcome of this lawsuit. • • •")

On the day that it denied the plaintiff's motion for a preliminary injunction, the circuit court granted a motion by the plaintiff for a temporary restraining order halting the defendant's sale of the plaintiff's property for a short period of time in order to give the plaintiff an opportunity to apply to the Federal district court for injunctive relief.

The plaintiff then sought and obtained from the United States District Court for the Northern District of Illinois a preliminary injunction which restrained the sale of the plaintiff's property "until the plaintiff has exhausted or abandoned its remedy in the State court." Although neither party has called it to our attention, an appeal was taken from that order of the court of appeals, which has stayed disposition of that appeal pending adjudication of the appeal which is now before us.

The plaintiff had previously instituted litigation in the Federal district court to enjoin the sale of its property for delinquent taxes for the years 1972 and 1973 on similar grounds. The complaints in those cases charged that the tax assessments against the plaintiff violated both the Illinois and the Federal constitutions, and the district court issued preliminary injunctions. The court's action was premised upon its view that the plaintiff lacked a "plain, speedy and efficient remedy" under the laws of Illinois, so that the Federal statute which prohibits injunctions against the assessment, levy, or collection of a State tax (28 U.S.C. sec. 1341) was inapplicable.

On appeal the United States Court of Appeals for the Seventh Circuit took a contrary view, and it reversed the judgment of the district court and remanded the case with directions to dismiss the complaint. (*28 East Jackson Enterprises, Inc.* v. *Cullerton* (1975), 523 F.2d 439.) The opinion of the court of appeals appears to accept the plaintiff's claim that the statutory procedure for challenging a real estate tax was not adequate in the circumstances alleged by the plaintiff. The court of appeals, however, relying on certain language in *Clarendon Associates* v. *Korzen* (1973), 56 Ill. 2d 101, and on two subsequent decisions by our court in *La Salle National Bank* v. *County of Cook* (1974), 57 Ill.2d 318, and *Hoyne Savings & Loan Association* v. *Hare* (1974), 60 Ill.2d 84, concluded: "[I]t is reasonably certain that the Illinois courts would entertain a suit for an injunction when a taxpayer establishes that he lacks the funds to comply with the statutory remedy of payment under protest." (523 F.2d 439, 442.) Circuit Judge Swygert, dissenting in part, expressed doubt whether the State courts would indeed entertain the plaintiff's claim. He accordingly took the position that the district court did have jurisdiction but that it should abstain from exercising jurisdiction pending submission of the plaintiff's claim to the State courts.

Following the decision by the court of appeals the plaintiff, on October 14, 1975, filed suit in the circuit court of Cook County to enjoin the sale of its property

for failure to pay taxes for the years 1972 and 1973, and on December 4, 1975, the plaintiff brought the present action to obtain the same relief as to its unpaid taxes for 1974. The plaintiff has advised us that the circuit court has continued the suits involving the 1972 and 1973 taxes until such time as we decide the present case.

Plaintiff also filed a petition for a writ of *certiorari* in the Supreme Court of the United States to review the decision of the court of appeals. That petition was denied by the Supreme Court on January 19, 1976 (423 U.S. 1073, 47 L. Ed. 2d 83, 96 S. Ct. 856), shortly after the filing of the complaint in the present case. The court of appeals initially stayed the issuance of its mandate until the Supreme Court could pass on a petition filed by the plaintiff for a rehearing of the denial of *certiorari*. After rehearing was denied on March 8, the court of appeals then granted an application for a further stay of its mandate pending final adjudication of the present case in the Illinois courts and also the actions filed by the plaintiff to contest its real estate taxes for 1972 and 1973.

In its complaint filed in this case the plaintiff states: "Plaintiff specifically excepts from its Complaint any allegations of or reliance upon its rights under the Constitution and laws of the United States, reserving solely to the federal courts the adjudication of such rights." The plaintiff also states in its brief in this court: "Counsel admit that parties to the state court action cannot prevent the state court from rendering a decision on a federal question if it chooses to do so, • • • albeit such decision cannot bind the District Court, is not *res adjudicata,* and in no way obviates a different holding by that Court."

As we view this case, its determination in this court does not depend upon an analysis of the intimate details of the Federal abstention doctrines. Our concern centers upon whether, under the Constitution of Illinois, we may pass upon those questions of State law which the plaintiff has raised, including the question whether the complaint alleges a cause of action for injunctive relief. We conclude

that we lack the authority to do so. As this case has been shaped, the role of the Illinois judicial system closely resembles that of a master in chancery for the Federal district court. Any judgment that an Illinois court might render would not definitely adjudicate the rights of anyone. It would be in the nature of an advisory opinion only. The Illinois Constitution does not vest this authority in its judges.

The judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

November 11, 1976

The Honorable Chief Justice and
Justices
Illinois Supreme Court
Springfield, Illinois

RE: No. 48505
28 East Jackson Enterprises, Inc.
v. Edward J. Rosewell, etc.

Your Honors:

Lest there be any confusion by my use during oral argument of the word "recant" with respect to preservation of our client's federal claims, I would respectfully reiterate my position by quoting from *England*• where the Court states:

> "In addition, the parties cannot prevent the state court from rendering a decision on the federal question if it chooses to do so;
>
> • • •
>
> a party may readily forestall any conclusion that he has elected not to return to the District Court. He may accomplish this by making on the state record the 'reservation to the disposition of the

• 375 U.S. 411, 421.

entire case by the state courts' that we referred to in *Button*. That is, he may inform the state courts that he is exposing his federal claims there only for the purpose of complying with *Windsor*, and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions. Such an explicit reservation is not indispensable; the litigant is in no event to be denied his right to return to the District Court unless it clearly appears that he voluntarily did more than *Windsor* required and fully litigated his federal claims in the state courts. When the reservation has been made, however, his right to return will in all events be preserved."

Cf., also Supplemental Brief for plaintiff/appellant, p. 7.

My use of the word "recant" was directed to what I perceived to be the impression of Mr. Justice Schaefer that by my remarks to the Court last spring that by declining to submit the federal issues to adjudication by the Court, I could in any way prevent the Court from rendering a decision on the federal question if it chose to do so. I cited *England* in June as my authority for the reservation. I intended and I respectfully ask that my remarks to the Court in the course of both oral arguments be construed as an effort on my behalf to live within the bounds set by *England*.

Very truly yours,
James L. Fox

JLF:ka
c.c. Mr. Henry Hauser,
Assistant State's Attorney

No. 74-1179

28 EAST JACKSON ENTERPRISES, INC.,
Plaintiff-Appellee,

v.

P. J. CULLERTON, Individually and as Cook County Assessor, and BERNARD J. KORZEN, Individually and as Treasurer and Ex-Officio Collector of Cook County,
Defendants-Appellants.

ON SECOND PETITION FOR REHEARING

MARCH 24, 1977

Before FAIRCHILD, *Chief Judge*, SWYGERT and SPRECHER, *Circuit Judges.*

FAIRCHILD, *Chief Judge.* Plaintiff, 28 East Jackson Enterprises, Inc., claims that the decision of the Illinois Supreme Court in the case of *28 East Jackson Enterprises, Inc.* v. *Rosewell,* No 48505 (IIllinois Supreme Court, December 3, 1976), establishes that plaintiff has no "plain, speedy and efficient remedy" in the courts of Illinois for the wrongful tax assessment it complains of in this action, and therefore, that our initial decision in this case, *28 East Jackson Enterprises, Inc.* v. *Cullerton,* 523 F.2d 439 (7th Cir. 1975), directing dismissal of petitioner's complaint for lack of federal jurisdiction because we believed such remedy to exist, should be reconsidered. We have read the opinion of the Illinois Supreme Court in the *Rosewell* case and do not believe it establishes that the courts of Illinois would not grant equitable relief to a taxpayer able to prove the facts alleged by plaintiff. Accordingly, we deny the petition to rehear.

I. *Plaintiff's Federal Suit*

The facts of this case, insofar as plaintiff claims wrongful tax assessments of its property in violation of the equal protection and due process clauses of the

United States Constitution and of various provisions of the Illinois Constitution and Code, are set forth in this court's initial opinion, *28 East Jackson Enterprises, Inc.* v. *Cullerton,* 523 F.2d 439 (7th Cir. 1975). We there reversed the district court's grant of a preliminary injunction prohibiting the tax authorities of Illinois from selling petitioner's property to satisfy past taxes owing. From our reading of various recent Illinois decisions, we concluded that the courts of Illinois would be willing to grant equitable relief in a case of improper tax assessment, that petitioner therefore had a "plain, speedy and efficient remedy" in state court for the injury he complained of, and that, as a result, the federal courts, pursuant to 28 U.S.C. § 1341,[1] lacked jurisdiction to consider petitioner's case. We remanded the case to the district court with directions to lift the injunction and dismiss the complaint for lack of jurisdiction. Our mandate to the district court has been stayed, first by plaintiff's application for *certiorari*[2] and then by order of this court pending final adjudication of plaintiff's state court case involving taxes on the same property, but for different years. It was our understanding that in plaintiff's state court case it was making the same claims as in its federal case, and based on that assumption, we were willing to stay our mandate and entertain a second petition for rehearing if the ultimate decision in the state court case established that there is no plain, speedy, and efficient state remedy for plaintiff's federal claims in plaintiff's alleged circumstances.

---

[1] 28 U.S.C. § 1341 provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law, where a plain, speedy and efficient remedy may be had in the courts of such state.

[2] Petitioner was denied *certiorari* by the Supreme Court on January 19, 1976. 423 U.S. 1073 (1976).

II. *Plaintiff's State Suits*

In October, 1975, plaintiff commenced proceedings in an Illinois court to enjoin the sale of its property for failure to pay taxes for the years 1972 and 1973. Shortly thereafter, plaintiff filed another suit seeking the same relief with respect to its unpaid taxes for 1974. In the latter case, the Circuit Court of Cook County refused to issue a preliminary injunction and subsequently granted the defendant's motion to dismiss. Appeal[3] was transferred directly to the Supreme Court of Illinois which affirmed the lower court's dismissal, *28 East Jackson Enterprises, Inc.* v. *Rosewell,* No. 48505 (Illinois Supreme Court, December 3, 1976). Plaintiff cites this affirmance as evidence that equitable relief is not available to it and that our decision in *28 East Jackson Enterprises, Inc.* v. *Cullerton* was erroneous.

We have considered the *Rosewell* decision of the Illinois Supreme Court and do not find that it evidences an unwillingness on the part of the courts of that state to grant equitable relief to a taxpayer in plaintiff's alleged circumstances. Indeed, it does not appear that Mr. Justice Schaefer's opinion addresses the issue of what relief is available in such cases. Rather, as the court saw it,

> The fundamental question . . . concerns the authority of Illinois courts to enter judgments which concededly lack finality because the issues that may be determinative have been deliberately excluded from judicial consideration.

---

[3] The suit seeking injunctive relief as to the 1972 and 1973 taxes was seemingly continued by the Circuit Court of Cook County pending the Illinois Supreme Court's resolution of the suit pertaining to the 1974 taxes. It has now been dismissed. *28 East Jackson Enterprises, Inc.* v. *Rosewell,* No. 75 CH 6436 (Circuit Court, Cook Cty., Jan. 26, 1977.)

And in response to this, Mr. Justice Schaefer wrote:

> As this case has been shaped, the role of the Illinois judicial system closely resembles that of a master in chancery for the Federal district court. Any judgment that an Illinois court might render would not definitively adjudicate the rights of anyone. The Illinois Constitution does not vest this authority in its justices.

Plaintiff must certainly bear primary responsibility for the Illinois Court's refusal to address the point here of interest, *i.e.* whether a "plain, speedy and efficient" remedy in a case of wrongful tax assessment is available in the courts of that state for a taxpayer in plaintiff's alleged circumstances. For throughout the state court litigation, plaintiff sought to exclude from consideration the merits of its federal claim. In its Rosewell complaint, petitioner stated:

> Plaintiff specifically excepts from its Complaint any allegations of or reliance upon its rights under the Constitution and laws of the United States, reserving solely to the federal courts the adjudication of such rights.

And in its brief to the Illinois Supreme Court, it continued:

> Counsel admits that parties to the state court action cannot prevent the state court from rendering a decision on a federal question if it chooses to do so, . . . albeit such decision cannot bind the District Court, is not *res adjudicata,* and in no way obviates a different holding by that Court.

It is obvious that it was this attitude of petitioner toward the role of the Illinois Supreme Court that prompted that Court's refusal even to address the issue of whether a remedy was available to petitioners.

III. *Continued Lack Of Federal Jurisdiction Under 28 U.S.C. § 1341*

As stated at the outset, our decision in this case was based on our reading of a number of recent Illinois decisions suggesting a willingness on the part of the courts of that state to grant equitable relief in appropriate tax cases, and the fact that if we were right in our interpretation of these decisions, exercise of federal jurisdiction in this case was barred by 28 U.S.C. § 1341. We find nothing in the Illinois Supreme Court decision in *Rosewell* which suggests that we were not correct in our interpretation of the position of the Illinois' courts on the matter of equitable relief in tax cases and so we are unpersuaded that our decision on federal jurisdiction must be reconsidered.

Apparently, plaintiff is of the opinion that the mere affirmance by the Illinois Supreme Court of the circuit court's dismissal of its case evidences that court's unwillingness to provide a speedy, adequate and efficient remedy. Plaintiff forgets that it would be the absence of such state remedy for a *federal claim* which would open the door of the federal court. The Supreme Court of Illinois, however, never reached the issue of available remedies, focusing instead on whether it should consider a case where it believed any decision would be subject to the ultimate review of the federal courts. And the Court's focus on this matter was directly attributable to plaintiff and the narrow way in which it framed its state court case.

Plaintiff argues that it was entitled so to frame the case, that the Supreme Court decision in *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964) established such a right. *England* stands for the proposition that where a case raising a federal claim is properly brought in federal court, a party subsequently sent to state court to resolve some aspect of the case, *see e.g., Railroad Commission of Texas* v. *Pullman Co.,* 312 U.S. 496 (1941), cannot be deemed to have waived his right to pursue his federal claim.

Critical to any reliance on *England* is the proper invocation of federal jurisdiction. The mere raising of a federal claim is not enough. For primary federal jurisdiction exists only to the extent Congress has provided, and it is by no means incumbent upon Congress to provide a federal forum for the vindication of every federal right. *See Sheldon* v. *Sill,* 49 U.S. (8 How.) 441 (1850); *see also* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System,* 330-75 (2d ed. 1973). In 28 U.S.C. § 1341, Congress decreed that in matters affecting state tax assessments or collections, no federal court shall have jurisdiction so long as a plain, speedy and efficient remedy is available in state court. This denial of jurisdiction is complete and applies regardless of whether the tax complaint filed invokes a federal claim alone or in conjunction with state claims. *See Mandel* v. *Hutchinson,* 494 F.2d 364 (9th Cir. 1974) (in which it was held that the jurisdictional bar of section 1341 was not avoided by challenging state tax statute on *federal* grounds); *see also* P. Bator, P. Mishkin, D. Shapiro and H. Wechsler, *Hart & Wechsler's The Federal Courts & the Federal System,* 978 (2d ed. 1973). The only concern is whether or not there is an adequate state court remedy for the federal claims could not rely on *England* to give it a continued right to have its federal claims in the case heard in federal court.

The attempt by plaintiff to reserve its federal claims in presenting its case of wrongful tax assessment to the Illinois courts has resulted in the Supreme Court of Illinois refusing to consider the merits of the case and, as to the matter of relief, rendering an opinion which neither confirms nor contradicts this court's opinion as to the remedies available in tax cases brought in the courts of that state. Accordingly, we are not persuaded that our initial decision was erroneous, and deny rehearing. We further lift the stay of mandate so that the cause will be remanded to the district court with in-

structions that the preliminary injunction be lifted and that the complaint be dismissed, all as originally decided.

PETITION DENIED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

No. 76-1823

In the
Supreme Court of the United States

OCTOBER TERM, 1976

28 EAST JACKSON ENTERPRISES, INC.,
Petitioner,

vs.

P. J. CULLERTON, Individually, and as County Assessor, and BERNARD J. KORZEN, Individually, and as Treasurer and Ex-Officio County Collector of Cook County,
Respondents.

On Petition For A Writ of Certiorari To The Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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The Scheffer Press, Inc.—(312) 263-6850

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CITATIONS.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1823

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28 EAST JACKSON ENTERPRISES, INC.,

Petitioner,

vs.

P. J. CULLERTON, Individually, and as County Assessor, and BERNARD J. KORZEN, Individually, and as Treasurer and Ex-Officio County Collector of Cook County,

Respondents.

On Petition For A Writ of Certiorari To The Court Of Appeals For The Seventh Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court is unreported. The opinion of the Court of Appeals for the Seventh Circuit and the opinion of Mr. Justice Swygert, dissenting in part are reported at 523 F. 2d 439 (7th Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976). The Supplemental Opinion of the Court of Appeals for the Seventh Circuit is reported at 551 F. 2d 1093 (7th Cir. 1977).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

The sole question presented by this Petition is whether an Illinois taxpayer has an absolute right to litigate any case involving state taxation in federal district court.

STATUTES INVOLVED

The pertinent provisions of the Johnson Act, 28 U.S.C. §1341, and the Civil Rights Act, 42 U.S.C. §1983 are set out in the Petition at pp. 3-4.

STATEMENT OF THE CASE

The petitioner is an Illinois corporation owning property subject to the real estate tax law of Illinois. Respondents are local tax officials charged with the assessment and collection of real estate taxes pursuant to Illinois law.[1] The subject matter of this case deals with local real estate taxes assessed against the petitioner for the year 1972, which taxes were payable in 1973.

In late 1973, the petitioner brought a civil rights action under 42 U.S.C. §1983 to enjoin the respondents from applying for the sale of petitioner's property for delinquent 1972 taxes. The petitioner asserted that 28 U.S.C. §§1343 (3) and 1331 supported Federal jurisdiction in the case.

The petitioner's theory for relief was that its real estate assessment was "constructively fraudulent." Illinois

[1] Thomas M. Tully, the present Assessor of Cook County, is the successor in office to Respondent P. J. Cullerton. Edward J. Rosewell, the present Treasurer and Ex-Officio County Collector of Cook County is the successor in office to Respondent Bernard J. Korzen.

courts have defined that term to include assessments of property at a level disproportionately higher than other similar property and have, upon proper proof, given relief therefor. *People ex rel. County Collector* v. *American Refrigerator Transit Company,* 33 Ill. 2d 501, 505, 211 N.E. 2d 694, 697 (1965). However, the district court ruled that petitioner's right to relief in the Illinois courts was not "plain, speedy and efficient" within the contemplation of 28 U.S.C. §1341.

The court of appeals, after a thorough review of Illinois law apposite to the case, reversed the district court. 523 F. 2d 439 (7th Cir. 1975). The taxpayer then petitioned this Court for a Writ of Certiorari, and on January 19, 1976 said Petition was denied. 423 U.S. 1073 (1976). Thereafter, the court of appeals stayed its mandate pending final adjudication of certain state court actions commenced by the taxpayer which involved taxes levied on the same property for the tax years 1972, 1973[2] and 1974.[3]

After the Illinois Supreme Court affirmed the dismissal of the taxpayer's state court action, *28 East Jackson Enterprises, Inc.* v. *Rosewell,* 65 Ill. 2d 420, 358 N.E. 2d 1139 (1976), the taxpayer filed a Second Petition for Rehearing with the court of appeals. The taxpayer maintained that the *Rosewell* decision evidenced an unwillingness on the part of the Illinois Courts to grant eqcitable relief to taxpayers in its alleged circumstances, *i.e.* taxpayers with

[2] The suit seeking injunctive relief as to the 1972 and 1973 real estate taxes was dismissed on January 26, 1977. *28 East Jackson Enterprises, Inc.* v. *Rosewell.* No. 75 CH 6436 (Circuit Court of Cook County, 1977).

[3] Dismissal of the suit seeking injunctive relief as to the 1974 taxes was affirmed by the Illinois Supreme Court. *28 East Jackson Enterprises, Inc.* v. *Rosewell,* 65 Ill. 2d 420, 358 N.E. 2d 1139 (1976).

allegedly insufficient funds to satisfy their real estate tax liability. The court of appeals did not interpret the *Rosewell* decision as barring Illinois taxpayers from obtaining equitable relief in state courts. Rather, the court of appeals in its supplemental opinion noted:

> Indeed, it does not appear that Mr. Justice Shaefer's opinion addresses the issue of what relief is available in such cases. Rather, as the court saw it:
>
> The fundamental question . . .
>
> > concerns the authority of Illinois courts to enter judgments which concededly lack finality because the issues that may be determinative have been deliberately excluded from judicial consideration.
>
> And in response to this, Mr. Justice Schaefer wrote:
>
> > As this case has been shaped, the role of the Illinois judicial system closely resembles that of a master in chancery for the Federal district court. Any judgment that an Illinois court might render would not definitively adjudicate the rights of anyone. The Illinois Constitution does not vest this authority in its judges.
>
> Plaintiff must certainly bear primary responsibility for the Illinois court's refusal to address the point here of interest, *i.e.* whether a "plain, speedy and efficient remedy in a case of wrongful tax assessment is available in the courts of that state for a taxpayer in plaintiff's alleged circumstances. For throughout the state court litigation, plaintiff sought to exclude from consideration the merits of its federal claim. [551 F. 2d at 1095.]

Based upon its interpretation of the *Rosewell* decision, the court of appeals denied the taxpayer's Second Petition for Rehearing. It is that determination which the taxpayer seeks to have this court review by certiorari.

ARGUMENT

I

THE PETITIONER HAD NO RIGHT TO EXCLUDE ITS FEDERAL CLAIMS FROM STATE COURT ADJUDICATION.

It is obvious from the taxpayer's Petition for a Writ of Certiorari that it believes it has an absolute right to litigate *any* case involving state taxation in a federal district court. Such a theory, however, fails to square with the Johnson Act, 28 U.S.C. §1341 (1948). That act bars federal district court injunctions in actions challenging state and local taxes where there is a plain, speedy and efficient remedy available to the taxpayer in the state courts. *Matthews* v. *Rogers,* 284 U.S. 521 (1932); and *Great Lakes Dredge & Dock Company* v. *Hoffman,* 319 U.S. 293 (1943). The rationale underlying the Congressionally mandated federal non-interference in this important area of state sovereignity was concisely stated by Mr. Justice Brennan in his concurring opinion in *Perez* v. *Ledesma,* 401 U.S. 82 (1971), and later cited by this Court with approval in *Lynch* v. *Household Finance Corporation,* 405 U.S. 538 at 542, fn.6 (1972). In his concurring opinion in *Perez,* Mr. Justice Brennan stated:

> The special reasons justifying the policy of federal non-interference with state tax collection are obvious. The procedures for mass assessment and collection of state taxes and for administration and adjudication of taxpayers' disputes with tax officials are generally complex and necessarily designed to operate according to established rules. State tax agencies are organized to discharge their responsibilities in accordance with the state procedures. If federal declaratory re-

> lief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. [401 U.S. at 127-128, fn. 17.]

This court has recently reaffirmed this principle in *Tully* v. *Griffin, Inc.*, ... U.S. ....., 97 St. Ct. 219, 50 L.Ed. 227 (1976). Holding that New York State courts provided New York taxpayers with a plain, speedy and efficient remedy for challenging a state tax on federal constitutional grounds, this Court stated:

> A federal district court is under an equitable duty to refrain from interfering with a State's collection of its revenue except in cases where an asserted federal right might otherwise be lost . . . . [Citations omitted.] This policy of restraint has long been reflected and confirmed in the congressional command of 28 U.S.C. §1341 that no injunction may issue against the collection of a state tax where the state law provides a "plain, speedy and efficient remedy." [..... U.S. at ....., 97 S.Ct. at 222, 50 L.Ed. 2d at 232.]

Accordingly, it is clear that when the petitioner excluded its federal claims from state court adjudication it precluded the state courts from reaching the merits of the claims presented by the taxpayer in its complaints. See: *28 East Jackson Enterprises, Inc.* v. *Rosewell*, 65 Ill. 2d 420, 358 N.E. 2d 1139 (1976); and *28 East Jackson Enterprises, Inc.* v. *Cullerton*, 551 F. 2d at 1094 (7th Cir. 1977). Cook Cnty. 1977). In addition, by framing its state court actions as it did, the taxpayer not only violated the stay order entered by the Seventh Circuit Court of Appeals on

April 5, 1976,[4] but also foreclosed that court from reaching any determination other than that the Illinois remedy was plain, speedy and efficient.[5]

To justify its "reservation of rights" theory the taxpayer attempts to rely on this Court's decision in *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). We suggest that the court of appeals correctly interpreted the holding of *England* when it declared:

> Critical to any reliance on *England* is the proper invocation of federal jurisdiction. The mere raising of a federal claim is not enough. For primary federal jurisdiction exists only to the extent Congress has provided, and it is by no means incumbent upon congress to provide a federal forum for the vindication of every federal right. [Citations omitted.] In 28 U.S.C. §1341, Congress decreed that in matters affecting state tax assessments or collections, no federal court shall have jurisdiction so long as a plain, speedy and efficient remedy is available in state court. *This denial of jurisdiction is complete and applies regardless of whether the tax complaint filed invokes a federal claim alone or in conjunction with state claims.* [Citations omitted.] The only concern is whether there is an adequate state court remedy for the federal claims. [551 F. 2d at 1096 (Emphasis Supplied).]

It is apparent that the manner in which the taxpayer framed its state court actions precluded the Illinois courts from adjudicating its federal claims. Since the taxpayer failed to afford the Illinois courts a full opportunity to

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[4] The stay order entered by the court of appeals was based upon its ". . . understanding that in the plaintiff's [petitioner's] state court case it was making the same claims as in its federal case. . . ." *28 East Jackson Enterprises, Inc.* v. *Cullerton*, 551 F. 2d at 1094 (7th Cir. 1977).

[5] *id.* at 1096.

determine its right to relief, the court of appeals properly determined that there was no evidence which would lead the court to conclude that its previous decision, that the Illinois remedy was plain, speedy and efficient, was in error.

II.

THE TAXPAYER'S REMAINING ARGUMENT WAS CONSIDERED BY THIS COURT UPON THE TAXPAYER'S FIRST PETITION FOR A WRIT OF CERTIORARI.

In its first Petition for a Writ of Certiorari filed with this Court, No. 75-755, the taxpayer maintained that the court of appeal's decision in this case was contrary to the mandate of *Township of Hillsborough* v. *Cromwell,* 326 U.S. 620 (1976). The taxpayer once again raises that argument as a reason for this Court to issue a Writ of Certiorari to the Court of Appeals for the Seventh Circuit. It is clear that the taxpayer again does not challenge the substantive manner in which Illinois courts remedy excessive assessments. Rather, the petitioner continues to assert that in Illinois there is no injunctive remedy to correct a "constructively fraudulent" assessment such as that which the taxpayer alleges was placed upon its property. In the alternative, the taxpayer contends that the extent to which the injunctive remedy is available is uncertain.

For the above reason *Hillsborough* is distinguishable. In *Hillsborough* the laws of New Jersey failed to provide a substantive remedy meeting the requirements mandated by this Court in *Sioux City Bridge Co.* v. *Dakota County,* 260 U.S. 441 (1923). The New Jersey courts had held that a taxpayer who was over-assessed must seek to raise the valuation of all property which was under-assessed. That

is not the case in Illinois. The relief contemplated by both *Sioux City* and *Hillsborough* is clearly authorized. See: *People ex rel. Skidmore* v. *Anderson,* 56 Ill. 2d 334, 307 N.E. 2d 391 (1974); and *People ex rel. County Collector* v. *American Refrigerator Transit Company,* 33 Ill. 2d 501, 211 N.E. 2d 194 (1965).[6]

The issue thus raised is whether Illinois courts will afford a taxpayer injunctive relief where that taxpayer is unable to pursue the remedy at law. The respondents contend, as they did when responding to the taxpayer's first Petition, that the answer to the above question is in the affirmative. See: *Clarendon Associates* v. *Korzen,* 56 Ill. 2d 101, 306 N.E. 2d 299 (1973); *LaSalle National Bank* v. *County of Cook,* 57 Ill. 2d 318, 312 N.E. 2d 252 (1973); *Hoyne Savings and Loan Association* v. *Hare,* 60 Ill. 2d 84, 322 N.E. 2d 833 (1974); *Exchange National Bank* v. *Cullerton,* 17 Ill. App. 3d 392, 308 N.E. 2d 284 (1st Dist. 1974); *Euclid Corporation* v. *Tully,* 42 Ill. App. 3d 105, 355 N.E. 2d 659 (1st Dist. 1976); and *Lopin* v. *Cullerton,* 46 Ill. App. 3d 378, 361 N.E. 2d 6 (1st Dist. 1977).

Accordingly, we submit that the court of appeals correctly determined that Illinois law clearly offered the petitioner a plain, speedy and efficient state court remedy. The mere fact that a civil rights action in the federal courts might be a better remedy should not authorize federal intervention into this highly important area of state sovereignty. *Bland* v. *McHann,* 463 F. 2d 21, 29 (5th Cir. 1972), *cert. denied,* 410 U.S. 966 (1973).

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[6] The policy of Illinois law is to require taxpayers claiming excessive valuation to follow the statutory legal remedy set out at Ill. Rev. Stat. 1973, ch. 120, §§675 and 716. That remedy requires payment under protest. Since the petitioner had insufficient funds to pay under protest, the court of appeals properly ruled that the legal remedy was unavailable to petitioner.

CONCLUSION

For the foregoing reasons the respondents respectfully pray that the petition for a Writ of Certiorari be denied.

Respectfully submitted,

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